No. 89-972

In The

Supreme Court of the United States

October Term, 1989

ANDREW HUNSBERGER,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether voluntary spontaneous statements, made by an accused after invoking his *Miranda* rights, concerning access to and quality of counsel, may be introduced at trial as evidence to rebut an insanity defense, without violating an accused's Fifth Amendment rights?

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The respondent, Commonwealth of Pennsylvania by Alan M. Rubenstein, District Attorney for Bucks County, Pennsylvania, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the Supreme Court of Pennsylvania entered on October 20, 1989.

STATEMENT OF THE CASE

The respondent incorporates the statement of the facts as set forth in the opinion below in *Commonwealth v. Hunsberger*, 565 A.2d 152 (Pa. 1989).

REASON FOR DENYING THE WRIT

I.

The holding of the Pennsylvania Supreme Court, that an accused's voluntary spontaneous statements concerning access to and the quality of counsel, made after invoking his *Miranda* rights, may be introduced at trial as evidence to rebut his insanity defense, is not in conflict with the decisions of this Court in *Miranda*[1] and its progeny.

In this case, the petitioner attacks the holding of the Pennsylvania Supreme Court that certain voluntary and spontaneous, post-*Miranda* statements made by the petitioner may be used at trial to rebut his insanity defense. The petitioner argues that this holding is in conflict with prior rulings of this Court.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), this Court held that the prosecution cannot use statements of an accused that stem from custodial interrogation, unless certain procedural safeguards are used to protect the accused's Fifth Amendment right to silence and counsel. Certain warnings must be read to an accused prior to police questioning, among them the right to remain silent, that anything said can and will be used against the individual in court, and the right to have counsel present prior to questioning. *Id.*

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1. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

at 444, 86 S. Ct. at 162. If an accused at any time, before or during questioning, indicates that he wishes to remain silent, or that he wants an attorney, the interrogation must end or the subsequent statements are inadmissible. *Id.*

Further, an accused's post-*Miranda* silence cannot be used against him at trial. In *Doyle v. Ohio*, 459 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), this Court further clarified an accused's privilege against self-incrimination when it held that the silence of an accused cannot be introduced into evidence for impeachment purposes. Such a use would be fundamentally unfair given the fact that the *Miranda* warnings are an implicit promise that silence will carry no penalty. *Id.* at 618, 96 S. Ct. at 2245.

The voluntary and spontaneous statements in question were made by the petitioner after he was informed of his *Miranda* rights and indicated that he wished to speak to an attorney, at which point police questioning ended. At the preliminary arraignment he was advised in open court by the District Justice how he could apply for a public defender. At which time, the petitioner stated, "How can I get to see the public defender on the sixth floor of the courthouse if I am in jail?" Additionally, he asked the first assistant district attorney, after being told that he was eligible for a public defender, "Are public defenders as good as money lawyers?" It is the position of the petitioner that these statements were invocations of his *Miranda* rights, and that, therefore, the decisions in *Miranda* and *Doyle* are controlling.

More specifically, the petitioner contends that the admissibility of these statements, as evidence to rebut his insanity defense, is in direct conflict with this Court's ruling in *Wainright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

In *Wainright*, the prosecution introduced the defendant's post-*Miranda* silence as evidence to rebut his insanity defense.

This Court held that the introduction of this evidence violated the defendant's privilege against self-incrimination. In discussing *Doyle*, this Court stated that "the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized." *Id.* at 292, 106 S. Ct. at 639. It is, therefore, unfair to breach that promise by using a defendant's silence to overcome an insanity defense. *Id.* This Court further pointed out that "silence does not mean only muteness, it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.* at 295, 106 S. Ct. at 640. An accused's invocation of his *Miranda* rights is protected, and is, therefore, inadmissible at trial.

The decision of the Pennsylvania Supreme Court does not, however, conflict with the *Wainright* ruling.

Contrary to the petitioner's contention, the Pennsylvania Supreme Court did not hold that an invocation of the right to silence and request for counsel are admissible to prove sanity. The Pennsylvania Court, in fact, "wholeheartedly embrace[d] the . . . theory of absolute prohibition" as set out in *Wainright*. *Commonwealth v. Hunsberger*, 565 A.2d 152, 155 (1989). Nevertheless, the Pennsylvania Court was able to properly distinguish the voluntary and spontaneous statements made by the petitioner from an accused's exercise of his right to silence:

> "The statements at issue are not . . . [the petitioner's] invocation of his right to remain silent; they are statements of the [petitioner's] intent to elicit information regarding either his attorney or the obtaining of an attorney. The [two] statements . . . cannot remotely be indicative of the [petitioner's] intent to remain silent." *Id.*

The Court went on to hold that such voluntary and

spontaneous statements are admissible, but limited its holding to cases where a prosecutor is attempting to rebut an insanity defense. *Id.*

The petitioner also contends that the holding of the Pennsylvania Supreme Court is contrary to rulings in other jurisdictions. The first case the petitioner cites is *People v. Stack*, 112 Ill. 2d 301, 493 N.E. 2d 339, 97 Ill. 2d 676, *cert. denied*, 479 U.S. 870 (1986). In *Stack*, in order to rebut an insanity defense, the prosecution introduced the defendant's post-*Miranda* statement inquiring what would happen if he chose to remain silent. The Illinois Supreme Court held that admitting that statement penalized the defendant and was fundamentally unfair pursuant to the *Doyle* and *Wainright* decisions. The petitioner further cites *State v. Rodgers*, 32 Ohio St. 3d 70, 512 N.E. 2d 581 (1987). In *Rodgers*, in response to an insanity plea the prosecution admitted evidence that, after being informed of his *Miranda* rights, the defendant looked up the number of an attorney in the phonebook, had a phone conversation with the lawyer, then told the police he had been advised to remain silent. The Supreme Court of Ohio held that using such silence as evidence to prove sanity violated the decision in *Wainright*.

The facts in both *Stack* and *Rodgers* are similar in that the prosecution in both cases introduced evidence of the defendants' invocation of their *Miranda* rights and their choice of silence in order to rebut the insanity defense. For that reason, the present case can be readily distinguished from them. In *Stack* and *Rodgers*, the implied promise guaranteed by the *Miranda* warnings was broken when evidence of the defendants' exercise of the right to silence was introduced against them at trial. The holding in *Wainright* demanded that such evidence be excluded. The petitioner, in the instant case, made volunteered statements of substance independent of any expression to remain silent. The respondent had stipulated at the Suppression Hearing that

petitioner's invocation of his right to remain silent following the reading of his *Miranda* warnings was not admissible. However, petitioner's subsequent verbal inquiries concerning the access to and the quality of counsel were not an invocation of his right to remain silent. Therefore, the Pennsylvania Supreme Court holding allowing the admission of these volunteered statements did not conflict with *Miranda* or *Wainright*.

The petitioner suggests that the holding of the court below was based upon the timing of the statements in question. There is nothing to suggest such a contention. The post-*Miranda* statements made by the petitioner were voluntary and not in response to any state questioning. The petitioner seems to overlook the settled principle that, excepting the limitations as set forth in *Doyle* and *Wainright*, volunteered statements given freely and without any compelling influences are admissible in evidence at trial. *Miranda, supra,* 384 U.S. at 478, 86 S. Ct. at 1630.

The holding of the Pennsylvania Supreme Court reflects the court's full consideration of the *Wainright* decision, and its possible application to the facts in this case. The court correctly concluded that the statements made by the petitioner were not statements of a desire to remain silent, nor statements of a desire to stay silent until he could consult with an attorney. The holding that the statements may be used to rebut the insanity defense does not conflict with any prior ruling of this Court.

CONCLUSION

For the reasons stated above, the respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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